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NO. 69175-9-I

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

IN THE MATTER OF THE ESTATE OF ERNEST A. HOWISEY

RESPONSE TO AMENDED BRIEF OF APPELLANT CAROL A. CARNAHAN

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I. INTRODUCTION

This case involves the administration of the Estate of Ernest Howisey who died on July 20, 2007. The Appellant seeks the review of several Orders and Judgments entered against her while acting as the Estate's Personal Representative; those claims are barred by the passing of time or have already been decided by the Court in an earlier appeal. Appellant also assigns fault to an interim Order that was well within the Trial Court's authority under Washington's Trust and Estate Dispute Resolution Act ("TEDRA"). For the reasons more fully described herein below, the Appellant's appeal should be denied and attorney fees and costs should be awarded to Respondents hereto.

II. STATEMENT OF THE CASE

A. Administration of the Estate

The Appellant, Carol A. Carnahan ("Appellant") is the daughter of the late Ernest Howisey ("Decedent"). Prior to Mr. Howisey's death, Mr. Howisey drafted two Wills, one dated June 30, 2005 and a later will dated August 12, 2005. The June 30, 2005 will named Partners In Care, ("PIC") as the personal representative of the estate (the "Howisey Will").

The August 12, 2005 will (the "Carnahan Will") named the Appellant as personal representative. A dispute arose as to which Will was to be probated. The matter was settled at mediation and the parties

signed a CR2A Settlement Agreement. As part of the settlement, the Carnahan Will was admitted for probate and Respondents Marilyn Jensen and Anne Sinnett ("Respondents") waived any rights to either will in exchange for cash payments totaling $200,000 and a one-half interest in the value of a 1966 Ford Thunderbird. A portion of the $200,000 was to be paid immediately and the remainder was secured by a promissory note signed by Appellant as PR of the Estate. The Estate did not fulfill its obligations under the CR2A Settlement Agreement. Respondents filed a lawsuit against the estate on the promissory note to collect the amounts owed and to remove Appellant.

B. The March 2010 Trial

During the March 2010 trial on a promissory note, it was established through Appellant's direct and cross-examinations that she had engaged in many irregular and self-dealing activities while administering the estate. In the Court's March 12, 2010 Judgment, Appellant was removed as personal representative and Respondents were granted a judgment against the estate and against Appellant personally. In response, the Appellant filed an Appeal on August 26, 2010 to this Court. In Appellant's Brief, she essentially contested the judgment obtained against her and made other assignments of error, many of which reappear in the instant appeal brief filed by Appellant on January 11, 2013.

C. Appellant's Prior Appeal to this Court

This Court of Appeals, issued its unpublished opinion on July 5, 2011 that denied all of Appellant's demands. *In re Estate of Howisey* noted at 162 Wash. App. 138 slip op at 1 (2011) attached as Appendix A. Appellant then filed a motion asking the Court of Appeals to reconsider its opinion, which the Court of Appeals denied. Additionally, the Court of Appeals ordered that the Estate and Appellant personally pay to the Plaintiffs appellate attorney fees in the amount of $13,255 and costs in the amount of $146.11, which was later reduced to a judgment.

D. Appellant's Earlier Motion to Modify the March 12, 2010 Judgment

Although this matter was deemed concluded by all parties, the Appellant filed a Motion to Modify the Findings of Fact and Conclusions of Law of the March 12, 2010 Order in June 2012. (Clerk's Papers (CP) 1312-1316). Respondents filed a Response that essentially notified the Court that the Appellant's Motion was untimely and should be denied. On June 29, 2012, the Court entered an Order denying Appellant's Motion to Modify. (CP 1319-1320). Also on June 29, 2012, the Court issued an Order that concluded the probate of case. (CP 1321-1322). Most notable from this Order is that the actions of the Successor Personal Representative, attorney Craig Coombs, were approved. *Id.* ¶1.

E. Appellant's Assignments of Error

The Appellant chose not to appeal either Order that was issued on June 29, 2012. Instead, the Appellant seeks to appeal: (1) the "implementation and management of [the] plan to sell the decedent's cabin" and (2) the removal and judgment of the Appellant granted in the March 12, 2010 Order. Appellate Brief, pg 2. Appellant also would like this Court to believe that Judge Prochnau erred when she: (1) issued Findings of Fact numbers 13, 30, 31, 34, 35, 26 and 27 in the March 12, 2010 Order; (2) denied the Appellant's petition to clear her name; (3) allegedly treated the parties inequitably; and (4) when she issued Orders on March 12, 2010, Dec. 4, 2010[1] and March 9, 2012. App. Br. pg. 3.The assignments of error can be categorized as follows:

1. Findings of Fact from the first appeal;
2. Rulings where she did not object at the trial court level or;
3. Rulings in which she acquiesced.
4. The last category alleged violation of the Canons of Judicial Ethics, are unsupported by citation to the record.

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[1] Respondents assume that the Appellant intended to assign error to the December 1, 2010 Order and not the December 4, 2010 Order as no orders were issued that day.

III. ARGUMENT

A. The Plan to sell the Cabin Was Not an Abuse of Discretion

Carnahan's first assigns error to the trial court's order to sell the Beaver Lake property. She insists that it was error to sell the property without using the procedures set forth in RCW 11.56 *et. seq.* Brief of Appellant, pg.3.

1. The Trial Court Properly Exercised Authority to Order the Sale.

The Appellant, however, does not cite any authority for her position. To the contrary, "the court may make, issue, and cause to be filed or served, any and all manner and kinds of orders, judgments, citations, notices, summons, and other writs and processes that might be considered proper or necessary in the exercise of the jurisdiction or powers given or intended to be given by this title." RCW 11.96A.060. The provisions under RCW 11.96A *et. seq.* give wide authority to the trial court to administer estates. See *Foster v. Gilliam*, 165 Wn. App. 33, 46, 268 P.3d 945 (2011). For this reason, the trial court's instruction on the sale of the property, absent a showing of fraud or irregularity, can not be undone. *Wilson v. McMillan*, 48 Wn. 378, 379, 93 P.529 (1908).

2. *Appellant Participated in the Negotiation of How to Sell the Property.*

Furthermore, Appellant was present at all hearings regarding the sale of the Beaver Lake Property. She prepared written pleadings and appeared at oral arguments. She actively worked to minimize the sale value and when asked if the court should sell it to her relatives for a lower price she said "yes." Report of Proceedings (3/9/12) 20: 22-24. There is no indication that Appellant was deprived of an opportunity to contest the valuations made at that time. Even though Appellant was a *pro se* litigant, she should be considered to have been sufficiently represented as *pro se* litigants are held to the same standards as those represented by attorneys. *In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1993).

3. *Appellant is Attempting to Appeal a Non-Appealable Decision*

Finally, Appellant's assignments of error to the Order dated March 9, 2012 are not properly before this Court of Appeals. The March 9, 2012 Order, is not a final order that can be appealed. See RAP 2.3(b); *In re Estate of Jones*, 170 Wn. App. 594, 605, 287 P.3d 610 (2012).

4. *Failure to Object at Final Hearing*

The June 29, 2012 Final Order, on the other hand, discharged the Successor Personal Representative Craig Coombs and approved all actions by him and his fees. The Final Order, was based on the Successor

Personal Representative's June 7, 2012 Petition for Order Approving Final Report and Granting Decree of Distribution. Such Petition was made pursuant to the procedures of RCW 11.76.100. (CP 1304-1311). There are two statutory methods to close an estate; by the procedures set out in RCW 11.68 *et. Seq.* (Declaration of Completion) or those set out in RCW 11.76 *et. Seq.* (Hearing on Final Report). In this case, the Successor Personal Representative chose the latter method that requires court approval of the final report and petition for distribution. RCW 11.76.050 provides for a final hearing before a decree of distribution is entered. The Appellant did not object, contest or appear at this hearing on the Successor Personal Representative's Petition and cannot argue new issues on appeal that were not presented at the trial level. RAP 2.5(a); See also *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 290, 840 P.2d 860 (1992). A timely objection would have given the trial court the opportunity to correct an error or hold further hearings. *New Meadows Holding Co. by Raugust v. Washington Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984); (Citing *Lake Air, Inc. v. Duffy*, 42 Wn.2d 478, 482, 256 P.2d 301 (1953)). Having failed to object or appear at the trial court's hearing on the Final Order, she cannot now appeal the court's interlocutory order as if it was, in fact the final order closing the estate.

B. The Removal of Appellant as Personal Representative Was Proper

In the Trial Court's March 12, 2010 Order, Appellant was removed as personal representative and Respondents were granted a judgment against the estate and against Appellant personally. In response, the Appellant filed an Appeal on August 26, 2010, where she was denied relief and by Order dated August 30, 2011, Commissioner Mary Neely of Division 1 of the Court of Appeals ordered that the Estate and Appellant personally pay to the Plaintiffs attorney fees in the amount of $13,255 and costs in the amount of $146.11. This was reduced to a Judgment in the aggregate amount of $13,401.11 on September 26, 2011.

1. The Removal and Judgment is the Law of the Case.

As noted, the Appellant sought review of her removal and the first of two judgments entered against her in her Appellate Brief dated August 26, 2010. App. Brief 8/26/10, pg.16. In this Court's Opinion dated July 5, 2011, the issues were decided and a final conclusion was reached. Therefore these issues have become "the law of the case" and a second appeal thereof is barred. *Greene v. Rothschild*, 68 Wn.2d 1, 402 P.2d 356 (1965); *Trautman Claim and Issue Preclusion in Civil Litigation in Washington,* 60 Wash. L. Rev. 805, 811 (1985).

2. *Appellant Failed to Challenge Important Findings in her First Appeal.*

The ruling of the trial court entering judgment on the note, removing Ms. Carnahan as Personal Representative and awarding fees was affirmed on the basis of unchallenged findings of facts Nos. 13, 16, 18, 21, 22, 24, 25, 26, 27, 28, 36 and 38.

RCW 11.28.250 specifically governs the removal of Personal Representatives. The Courts have long held that a Personal Representative may be removed for reasons other than those cited in the statute. *In re Stotts' Estate*, 133 Wn. 100, 233 P.280 (1925); *In re Borman's Estate*, 50 Wn.2d 791, 314 P.2d 617 (1957). The statute states as follows:

> Whenever the court has reason to believe that any personal representative has wasted, embezzled, or mismanaged, or is about to waste, or embezzle the property of the estate committed to his charge, or has commit, or is about to commit a fraud upon the estate, or is incompetent to act, or <u>is permanently removed from the state</u>, or has wrongfully neglected the estate, or has neglected to perform any acts as such personal representative, <u>or for any other cause or reason which to the court appears necessary</u>, it shall have power and authority, after notice and hearing to revoke such letters. The manner of the notice and of the service of the same and of the time of hearing shall by wholly in the discretion of the court, and if the court for any such reasons revokes such letters the powers of such personal representative shall at once ease, and it shall be the duty of the court to immediately appoint some other personal representative, as in this title provided.

RCW 11.28.250 (emphasis added).

The Court has broad discretion to remove a Personal Representative so long as the grounds for removal is valid. *In re Beard's Estate*, 60 Wn.2d 127, 372 P.2d 530 (1962).

The general philosophy is to penalize conduct by a personal representative "hampering the orderly administration of the estate." *In re Blodgetts Estate*, 67 Wn.2d 92, 95, 406 P.2d 638 (1965). "Such findings and conclusions will not be overturned unless arbitrary and capricious..." *Blodgett* at 95. In *Blodgett* family contentiousness was sufficient. In *In re Estate of Aaberg*, 25 Wn. App 336, 607 P.2d 1227 (1980), the failure to inventory a $125 car or account for one eighth of $580 worth of household furnishings was sufficient for removal. Antagonism toward creditors was found to be sufficient in *In re Wolfe's Estate*, 186 Wn. 216, 218, 57 P.2d 1066 (1936) and *In Stotts Estate,* 133 Wn. 100, 233 P. 280 (1925).

In any event, the unchallenged findings (especially 22, 24, 25, 26, 27, 28 and 36) supported Appellant's removal.

3. The Judgment Entered Against Appellant Was Also Proper.

There is also ample support for the Judgment entered against Appellant; both in law and by virtue of the unchallenged findings, including Finding No. 16. The Personal Representative has a statutory duty to administer the estate "as rapidly and as quickly as possible, without sacrifice to the probate or non-probate estate." RCW 11.48.010.

Appellant stood in a position of a fiduciary to those with a beneficial interest in the estate. See *Matter of Estate of Larson*, 103 Wn.2d 517, 694 P.2d 1051 (1985).

> "(T)he power of executors to manage and control an estate exists *for the protection of creditors and for the purpose of paying expenses and other proper charges against the Estate*."

Kerns v. Pickett, 49 Wn.2d 770, 772-73, 306 P.2d 1112 (1957) (emphasis original). When an Estate owes money on a contract, an action may be maintained against the Personal Representative, who is liable for losses caused by her breach of responsibilities. *See In re Estate of Wilson*, 8 Wn. App. 519, 528, 507 P.2d 902 (1973) citing *Hesthagen v. Harby*, 78 Wn.2d. 934, 942, 481 P.2d 438 (1971) (failing to protect "rights of valid creditors."). To the extent that Ms. Carnahan may have used estate funds to reimburse herself for alleged expenditures, she "may not pay a claim due to (her)self from the estate instead of filing it in the legal way." *In re Eckert's Estate*, 14 Wn.2d 497, 506, 128 P.2d 656 (1942).

The Washington Supreme Court has held that a personal representative is personally liable for his breach of fiduciary duty to those beneficially interested in the estate.

> "The administration of a decedent's estate is an officer of the court and stands in a fiduciary relationship to those beneficially interested in the estate. In the performance of his fiduciary duties he is obligated to exercise the utmost good faith and to utilize the skill, judgment, and diligence

> which would be employed by the ordinarily cautious and prudent person in the management of his own trust affairs. For a breach of his responsibilities which causes loss to another, he stands liable.

Hesthagen v. Harby, 78 Wn.2d at 942.

C. The Trial Court did not Violate Any Canons of Judicial Ethics

Appellant alleges that certain Findings of Fact made in the March 12, 2010 Order lacked substantial evidence. Appellant acknowledges that the Findings she appealed in her first appeal are *res judicata* but does not realize that the Findings appealed now, namely Findings of Fact nos. 13, 30, 31, 34, 35, 26, 27 and 36, are considered the law of the case and appeal thereof is barred. *Fluke Capital & Mgmt. Serv. Co. v. Richmond*, 106 Wn.2d 614, 620, 724 P.2d 356 (1986).

It is possible that Appellant does realize that an appeal of the March 12, 2010 Order is untimely but attempts to subvert the untimeliness by averring several unfounded allegations of judicial misconduct, including bias. Appellant fails to cite any misconduct by the trial court.

1. Appellant Failed to File a Timely Application of Prejudice.

RCW 4.12.040(1) provides, "No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when ... said judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause." RCW 4.12.050(1) states

that any party may establish prejudice by filing a motion and a supporting affidavit alleging that the judge before whom an action is pending is prejudiced against that party or the interests of that party. *State v. Hawkins,* 164 Wn.App. 705, 712, 265 P.3d 185 (2011). If Appellant believed that the Judge was biased, then a motion to that effect should have been made at that time.

2. The Trial Court Showed No Signs of Bias.

Furthermore, the Canons of Judicial Ethics preclude any judge from hearing a case if the judge's impartiality may be reasonably questioned. CJE 3(C)(1); RCW 4.12.040. In order to show bias, the Appellant must make an affirmative showing of prejudice other than a general predilection toward a given result. *Medical Disciplinary Bd. V. Johnston*, 99 Wn.2d 466, 474-75, 663 P.2d 457 (1983). Here, Appellant alleges that the trier of fact in this case was biased against her. Brief pg. 42. However, Appellant merely defends her prior actions without offering any affirmative showing of actual prejudice or any authority in support of her assignment of error. See *Skagit County Public Hosp. Dist. No. 1 v. State, Dept. of Revenue*, 158 Wn.App. 426, 440, 242 P.3d 909 (2010).

3. Any Errors Alleged are Trivial With No Material Effect.

Notwithstanding, errors made with respect to any Findings of Fact are of no significance. "Factual findings are reviewed under the

substantial evidence standard, under which there must be a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true." *Wilson v. Employment Sec. Dept. of State*, 87 Wn.App. 197, 200-1, 940 P.2d 269 (1997); (Citing *Penick v. Employment Sec. Dep't*, 82 Wn.App. 30, 37, 917 P.2d 136, *review denied*, 130 Wn.2d 1004, 925 P.2d 989 (1996)). "If the standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently." *Croton Chem. Corp. v. Birkenwald, Inc.*, 50 Wn.2d 684, 779-880, 314 P.2d 622 (1957).

Here, Appellant presents only trivial differences between the Findings made by the trial court and what she now asserts as true. (e.g. Whether she flitted through 5 attorneys or 4 attorneys.) Great deference is given to the trial court's factual findings. *Wilson* at 201. Moreover, "an erroneous finding of fact not materially affecting the conclusions of law is not prejudicial and does not warrant reversal." *Skagit* at 449; (citing *State v. Caldera*, 66 Wn. App. 548, 551, 832 P.2d 139 (1992)). Here, even if errors were committed, they are not sufficient to overturn the Conclusions reached by the trial court.

D. The Trial Court did Not Treat the Parties Inequitably

1. The Trial Court has Broad Authority to Remove a Personal Representative.

As stated, this case was decided in accordance with the Trust and Estate Dispute Resolution Act (TEDRA) codified in RCW 11.96A.010 et. seq. Pursuant to TEDRA, the trial court has "full and ample power and authority... to administer and settle: ... (a) All matters concerning the estates of ... deceased persons...." RCW 11.96A.020(1). TEDRA confirms the Court's plenary powers to "proceed ... in any manner and way that to the court seems right and proper, all to the end that the matters be expeditiously administered and settled by the court". RCW 11.96A.020(2). More specifically, RCW 11.96A.060 confirms the Court's authority to issue "all manner and kinds of orders, judgments, citations, notices, summons and writs and processes that might be considered proper or necessary in the exercise of the jurisdiction or powers given by this title." The Court has broad discretion when removing a personal representative where the grounds for removal are valid; "a superior court which has jurisdiction over an estate may remove an executor for any proper cause." *Beard's Estate*, 60 Wn.2d at 132. "The probate court has authority by law to remove one administrator and appoint another for any cause it deems sufficient, and the ruling is subject to review only if it is arbitrary and capricious." *In re Blodgett's Estate*, 67 Wn.2d 92, 95 406

P.2d 638 (1965). The trial court's decision to remove Appellant as personal representative was based on a proper cause and therefore was not done arbitrarily or capriciously.

2. Appellant is Simply Displeased With the Results of Her Own Actions.

Essentially, the trial court has the authority to make decisions with which not all parties will be happy. Appellant appears to simply be unhappy with the results as she does not describe in detail how the parties were treated inequitably. Appellant presents no new evidence and relies entirely on the record upon which the trial court relied when making its Findings in this case. The trial court's Findings cannot be substituted even if this Court would have resolved the issue differently. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). Moreover, where a party is unhappy with a specific result, it does not necessarily mean that she has been treated inequitably. *Clausing v. Clausing*, 47 Wn.App. 676, 681, 736 P.2d 1103 (1987).

E. The Trial Court Did Not Err by Denying Petition to Clear Appellant's Name

1. Appellant Cannot Rewrite History.

Appellant later qualifies this assignment of error by apparently alleging that the court erred when it refused to amend the Findings of Fact and Conclusions of Law. Brief. Pg 4. In June 2012, Appellant filed a

Motion to Modify a Finding of Fact and a Conclusion of Law and Other Relief; on June 29, 2012, the court denied Appellant's Motion. Essentially, the Findings complained of in the prior Motion were that Appellant caused financial harm to the Estate. It is Respondents' belief that Appellant seeks to rewrite history such that she is no longer found to have caused harm to the Estate. However, the simple fact of the matter is that Appellant prepared unclear and deficient accountings, commingled estate assets with her own, transferred assets into her own name instead of the Estate and did not wrap up the Estate in a timely manner. Thus, the trial court properly found that this caused harm to the Estate. As a consequence, the trial court saw no reason to modify its prior Judgment.

2. Appellant's Appeal of the June 2012 Order is Untimely.

Notwithstanding, the Appellant had 30 days to appeal the June 29, 2012 Order. RAP 5.2(a). Appellant filed the instant appeal on September 17, 2012. As more than 30 days have elapsed, the appeal is untimely.

Moreover, Appellant sought to modify the Judgment entered on March 12, 2010. As previously stated, the Appellant's appeal of this Order is untimely, subject to *res judicata* and without merit.

Finally, Appellant assigns error to Orders entered December 4, 2010 and March 9, 2012. Regardless of the fact that Appellant seems to add these assignments of error as an afterthought as no valuable discussion

is presented regarding them; these appeals are without merit for the reasons stated herein.

F. Attorney's Fees and Costs

Finally, Respondents are entitled to an award of fees pursuant to RAP 18.1. In the first appeal, this court cited three grounds for an award of fees. Howisey Slip Op. page 9. Ms. Carnahan cannot revisit the Findings from the trial in 2010. They are the laws of the case. *Greene* supra at 6-7; *Trautman* supra at 811. Appellant cannot also complain of rulings where she did not object (*Washburn* infra at 290) nor can she complain of rulings where she acquiesced ("yes"). That leaves only her claims of numerous violations of the Canons of Judicial Ethics which she fails to support with evidence.

IV. CONCLUSION

The instant appeal is a desperate act made by the former Personal Representative in this case. She made many errors, commingled Estate funds, created waste, did not act in a timely way all of which harmed the Estate. The trial court heard testimony, received evidence, made certain findings, which resulted in conclusions that Appellant caused harm to the Estate. She further compounded these errors with additional errors and now wants this Court to believe that the trial court was the cause of such

errors. Appellant either has already sought review, is otherwise out of time to seek review or the trial court acted properly.

Appellant received notice of all actions made, was presented with opportunities to submit pleadings regarding the actions complained of; to which she either affirmatively assented, or failed to object.

DATED this 8 day of May, 2013.

HELSELL FETTERMAN LLP

By _____
Michael L. Olver, WSBA #7031
Attorneys for Respondents

CERTIFICATE OF SERVICE

I, MICHELLE N. WIMMER, hereby declare and state as follows:

1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.

2. I am now and at all times herein mentioned employed by the offices of Helsell Fetterman LLP, 1001 4th Avenue, Suite 4200, Seattle, WA 98154.

3. I did on the date written below (1) cause to be filed with this Court the Response to Amended Brief of Appellant Carol Carnahan; (2) caused the same to be delivered via email, to the following recipients: Craig Coombs at craigc@coombslawfirm.com, Coombs Law Firm PLLC, 1715 114th Ave SE Ste 203, Bellevue, WA 98004-6906; and via email and US Mail to Carol Carnahan at carnahan@cnw.com, PO Box 225, Greenbank, WA 98253, who is the Appellant.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED: May 9, 2013

MICHELLE N. WIMMER

Appendix A

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington,
Division 1.
In re the Probate ESTATE OF Ernest A. **HOWISEY**, Deceased.

No. 65217–6–I.
July 5, 2011.

Appeal from King County Superior Court; Honorable Kimberley Prochnau, J.
Robert Michael Bartlett, Cook & Bartlett, Seattle, WA, Carol Carnahan (Appearing Pro Se), Greenbank, WA, for Appellant(s).

Michael L. Olver, Helsell Fetterman LLP, Seattle, WA, for Respondent(s).

UNPUBLISHED OPINION

SPEARMAN, J.

***1** Carol Carnahan appeals certain findings of fact and conclusions of law, the judgment, and the attorney fee award entered in favor of Marilyn Jensen and Anne Sinnett. In 2008, Jensen and her daughter Sinnett (Jensen/Sinnett) entered into a settlement agreement with Carnahan, Jensen's sister, under the Trust and Estate Dispute Resolution Act (TEDRA), chapter 11.96A RCW, to resolve the parties' dispute over the will of Carnahan and Jensen's deceased father, Ernest Howisey. The parties agreed, among other things, that the Final Will would be probated and that Jensen/Sinnett would receive $200,000. Half was paid immediately and they were given a promissory note for the remainder, secured by Howisey's house. The house was sold but the proceeds were not enough to satisfy the note, and Jensen/Sinnett brought a petition for judgment on the note. The main issues on appeal are whether the trial court erred in ruling that Jensen/Sinnett were estate creditors with priority to receive satisfaction of their note before distribution of the estate's assets and that Carnahan, as successor personal representative (PR), was personally liable. We hold that the court's factual findings, insofar as they are material to these issues, were supported by substantial evidence and that the court's findings of fact supported its conclusions of law and judgment. We also award attorney's fees on appeal to Jensen/Sinnett.

FACTS

Ernest Howisey, who died on July 30, 2007, was survived by daughters Carnahan and Jensen and granddaughter Sinnett. He made one will dated June 30, 2003. Under that will, William Jaback, the executive director of Partners in Care (PIC), was appointed PR of the estate and Carnahan, Jensen, and Sinnett received equal shares. Carnahan offered a different will (Final Will), dated August 12, 2005, to probate. Under the Final Will, Carnahan was appointed PR; she and Jensen were equal heirs to the residuary; and a few individuals, including Sinnett, received specific bequests. Jensen and Sinnett objected to the probate of the Final Will. The matter was set for trial, but the trial court first ordered mediation.

The mediation on February 6, 2008 resulted in a settlement, which was memorialized by an agreement (Agreement) pursuant to Civil Rule (CR) 2A and TEDRA. Jensen/Sinnett, Carnahan, and Jaback agreed that the Final Will would be admitted to probate, with Carnahan serving as successor PR. As to the beneficial share of Jensen and Sinnett, they agreed:

> Marilyn Jensen and Anne Sinnett shall be paid $200,000 as their beneficial share of the estate and shall have no further interest or involvement in the administration of this estate. Marilyn Jensen and Anne Sinnett specifically waive any ownership interest in any asset of the estate. Wil-

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liam Jaback shall issue a check payable to Marilyn Jensen and Anne Sinnett, jointly, in the amount of $100,000 within 7 days of this agreement and the remainder shall be secured by a note on the Corliss residence [FN1] at 4% interest, due and payable on sale of the Corliss residence or within one year of the date of this agreement, whichever occurs sooner. The Personal Representative shall at all times maintain homeowner's, (fire) insurance on the residence.

FN1. The "Corliss residence" was Howisey's house.

***2** They also agreed that Jensen/Sinnett would receive certain specified items of personal property and one-half the value of a 1966 Thunderbird "either appraised or sale value, @ [Carnahan's] option, within 60 days of her appt. as PR." The Agreement included a release clause.[FN2] PR Jaback issued Jensen/Sinnett a check for $100,000 and executed a promissory note for the remaining $100,000 on February 19, 2008.[FN3] A notice of filing of a memorandum of the Agreement was filed in trial court on March 5, 2008, as was the memorandum. These documents were served on all beneficiaries, none of whom filed any objection to the Agreement. On March 21, 2008, the trial court appointed Carnahan as successor PR and admitted the August 12, 2005 will into probate.

FN2. The release clause provided, in pertinent part:

Carol Carnahan, Marilyn Jensen and Anne Sinnett do hereby affirmatively fully release one another from all liability related to this agreement, and the administration of the Estate of Ernest Howisey under King County Cause Nos. 07–4–04064–9SEA and 03–4–05875–8SEA. In exchange for the consideration set forth in this CR 2A Settlement ... Carol Carnahan, Marilyn Jensen and Anne Sinnett hereby release and discharge each other, William Jaback and Partners In Care, their agents, employees, partners and lawyers from and against any and all claims, liabilities, actions, suits, debts, expenses, attorneys' fees, causes of action, and/or claims for compensation or damage of any kind or nature, whether known or unknown, whether existing now or arising at any time in the future, which arise from or relate in any way to the administration of the durable power of attorney and the estate of Ernest Howisey.

FN3. The promissory note stated, in full:

FOR VALUE RECEIVED, WILLIAM C. JABACK, as Personal Representative of the **ESTATE OF ERNEST HOWISEY,** Deceased, King County Superior Court Cause Number 07–4–04064–9SEA, promises to pay to **MARILYN JENSEN and ANNE SINNETT,** or order, the principal sum of ONE HUNDRED THOUSAND DOLLARS ($100,000) with interest from the 6th day of February, 2008 on the daily unpaid principal balance, at the rate of four percent (4.00%) per annum, as follows:

In all events, this Promissory Note is payable in full as to both unpaid principal and accrued but unpaid interest on or before the sooner sale of the real property securing payment of this Promissory Note or the 6th day of February, 2009.

This Promissory Note is secured by a Deed of Trust on real property commonly known as 11535 Corliss Avenue North, Seattle, Washington 98133–8534.

If any payment is not made as required, interest thereafter shall accrue at the rate of twelve percent (12%) per annum on

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> the whole unpaid sum of principal, and the whole sum of both principal and interest shall become due and payable at once without further notice, at the option of the holder hereof.
>
> If this note shall be placed in the hands of an attorney for collection, or if suit shall be brought to collect any of the principal or interest of this note, the undersigned promises to pay a reasonable attorney's fee.
>
> It was signed by Jaback in his capacity as PR.

Carnahan received a foreclosure notice for the Corliss residence on August 27, 2008. Sometime after she received this notice, she distributed some of the specific bequests. She expended substantial time and effort in preparing the house for sale and tried to sell it for the original asking price, which would have accommodated the amount owed on the promissory note. After experiencing difficulty selling it at that price, Carnahan requested Jensen/Sinnett to agree to reduce the amount owed to them on the note, explaining that because of the poor housing market and imminent foreclosure she wanted to reduce the asking price of the house by the amount they agreed to forgo. They declined. Carnahan sold the house for fair market value on November 20, 2008. The net proceeds were distributed to Jensen/Sinnett but were insufficient to satisfy the entire note, leaving $28,287.56 to be paid.

On February 6, 2009, one year after the date of the Agreement, the balance became due and owing. FN4 According to the terms of the promissory note, the unpaid principal balance bore interest at the rate of 12% annum. The note provided for reasonable attorney's fees if it had to be collected by an attorney. Jensen/Sinnett sent Carnahan a demand for $28,287.56, attorney's fees, and interest of 12%. Carnahan petitioned the trial court for instructions on how to proceed after the sale of the house resulted in insufficient funds to satisfy Jensen/Sinnett's note and the specific bequest to Marianne Hansen. She requested that no further payment be due on the note due to unforeseen conditions in the housing market. Jensen–Sinnett filed a petition for judgment on the promissory note on May 4, 2009. The court commissioner granted judgment to Jensen/Sinnett in the amount for the remainder of the note plus interest, but Judge Barbara Mack vacated the commissioner's order on revision and remanded the issues to the commissioner.

> FN4. Although the Agreement provided that the note was due and payable upon sale of the Corliss residence or one year from the date of the Agreement, whichever occurred sooner, Jensen/Sinnett contended below, and the trial court found, that the Agreement was breached by the failure to pay by February 6, 2009.

On November 2, 2009, Jensen/Sinnett again filed a petition for judgment on the promissory note, seeking judgment against Carnahan personally and in her capacity as PR for the unpaid balance of their promissory note plus attorney's fees and costs. They also sought to remove Carnahan as PR. Carnahan filed a "petition for distribution" on November 3, requesting the trial court to rule on the unresolved issues.

***3** The matter was set for trial, which was held March 2 to March 4, 2010 before Judge Kimberly Prochnau. Following trial, the court entered findings of fact, conclusions of law, and a judgment. It concluded that under RCW 11.76.050, the debts of the estate were to be paid before the distribution of any property and that Jensen/Sinnett were creditors of the estate. It concluded that the estate and Carnahan personally were liable for the unpaid portion of the promissory note and for an amount due for the Thunderbird. The trial court entered judgment in favor of Jensen/Sinnett in the amount of $28,287.56 plus a per diem of $8.18 for each day after February 6, 2009 until paid and $2,837.50 (half the value of the Thunderbird). It ordered Carnahan removed as PR while approving $25,000 in administration ex-

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penses for her work as PR; ordered that the estate's interest in the Beaver Lake cabin be sold; entered judgment in favor of Marianne Hansen for the bequest to her and her late mother; [FN5] and awarded Jensen/Sinnett attorney's fees and costs, [FN6] later determined to Carnahan appeals.

FN5. Hansen was a cousin of Carnahan and Jensen. She and her late mother, Gudrun Hansen, were named beneficiaries of specified amounts under the will.

FN6. "Attorneys' fees are awarded to Petitioners against the Estate and against Carol Carnahan, individually under RCW 11.76.070 and by the terms of the promissory note and under RCW 11.96A.150. Fees are awarded under RCW 11.96A.150 because Ms. Carnahan's actions as Personal Representative of the Estate has led to the necessity of Petitioners' claims and the foregoing trial."

DISCUSSION

Carnahan argues that the trial court erred in ruling that (1) Jensen/Sinnett were creditors of the estate and could recover against the estate as creditors rather than beneficiaries, (2) Jensen/Sinnett's claims had a higher priority of payment than that of residual beneficiaries, and (3) Carnahan was personally liable. She also assigns error to certain findings of fact and the trial court's award of attorney's fees. We hold that the trial court's challenged findings of fact, to the extent they are material to the challenged conclusions of law, are supported by substantial evidence and that the findings of fact in turn support the trial court's conclusions of law and judgment. We also conclude that the trial court's award of attorney's fees was proper and award attorney's fees on appeal to Jensen/Sinnett.

Findings of Fact and Conclusions of Law

Where, as here, findings of fact and conclusions of law are entered following a bench trial, we limit our review "to determining whether the findings are supported by substantial evidence, and if so, whether the findings support the trial court's conclusions of law and judgment." *Sunnyside Valley Irr. Dist. v. Dickie,* 111 Wash.App. 209, 214, 43 P.3d 1277 (2002) *aff'd,* 149 Wash.2d 873, 73 P.3d 369 (2003). "Substantial evidence exists if a rational, fair-minded person would be convinced by it." *In re Estates of Palmer,* 145 Wash.App. 249, 265–66, 187 P.3d 758 (2008), (quoting, *Rogers Potato Service, L.L.C. v. Countrywide Potato, L.L.C.,* 152 Wash.2d 387, 391, 97 P.3d 745 (2004)). Unchallenged findings of fact are verities on appeal. *In re Estate of Jones,* 152 Wash.2d 1, 8, 93 P.3d 147 (2004). We review conclusions of law de novo. *State v. Gatewood,* 163 Wash.2d 534, 539, 182 P.3d 426 (2008).

The main issues on appeal are whether the trial court erred in ruling that Jensen/Sinnett were estate creditors with priority to receive satisfaction of their note before distribution of the estate's assets and that Carnahan was personally liable. We incorporate discussion of the challenged factual findings insofar as they relate to these issues. [FN7] Initially, Carnahan argues that the Agreement's broad release language should have barred Jensen/Sinnett altogether from bringing their petition for judgment on the promissory note, citing *Bakamus v. Albert,* 1 Wash.2d 241, 95 P.2d 767 (1939) in support. [FN8] She argues that the trial court failed to treat the Agreement as a final, binding court order under RCW 11.96A.230(2). [FN9] But the trial court specifically concluded that the Agreement, made pursuant to RCW 11.96A.200, *was* the equivalent of a final court order, and Jensen/Sinnett do not dispute that the Agreement was final and binding. Instead, they argue that their suit on the promissory note was not precluded by the Agreement's release clause because they did not waive future claims based on future acts or any rights to enforce the Agreement itself, only claims that arose out of facts that existed up to and at the time they signed the Agreement.

FN7. In addition to the challenged findings discussed in our opinion, Carnahan also

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challenges findings of fact 15, 19, 20, and 37, which state:

> 15. On November 14, 2008, the Court issued an order that stated, inter alia: 'To the extent that the proceeds [of the sale of the property] do not satisfy the promissory note any unpaid portion of the Promissory Note remains an obligation of the Estate.' The form of the order on Petitioners' petition was an agreed order, presented by both Carol Carnahan and counsel for Petitioners.
>
> ....
>
> 19. Petitioners filed a Request for Notice of Proceedings on August 10, 2007 pursuant to RCW 11.28.240 that required Ms. Carnahan, as Personal Representative, to give Petitioners notice before she paid any attorneys' fees or claims of the Personal Representative against the Estate.
>
> 20. Ms. Carnahan has not filed an annual report since her appointment as Personal Representative.
>
> ...
>
> 37. Ms. Carnahan transferred the Wyoming property to herself personally rather than transferring it into the estate.

Carnahan challenges finding of fact 15 on the ground that the order in question was not agreed, but only presented by both parties after the trial court ordered them to prepare an order. She argues that findings of fact 19 and 20 are not supported by substantial evidence because under the Agreement Jensen/Sinnett had no further interest in the estate, so there was no need to provide notice or reports to them. As to finding of fact 37, Carnahan contends that under the terms of the Final Will and the Agreement, she was entitled to all property not otherwise disposed of, and under the Agreement, she had no duty to transfer the Wyoming property into the estate. Her arguments are not well taken because she fails to challenge the substance of these findings. Though we agree that there is no evidence that the order referred to in finding of fact 15 was agreed, her challenge on this basis is irrelevant because she does not challenge the substance of the commissioner's order that the property should be sold, the proceeds applied to the note, and any unpaid portion of the note remained an obligation of the estate. Finding of fact 20 does not state that Carnahan was required to provide reports to them, only that she had not filed an annual report since she was appointed as PR. She does not dispute this. Nor does Carnahan dispute that she did in fact transfer the Wyoming property to herself. Finally, regarding finding of fact 19, Jensen/Sinnett did file, shortly after Howisey died, a "Request for Notice of Proceedings" that requested the PR (Jaback, at the time) to provide written notice of certain proceedings pursuant to RCW 11.28.240. Carnahan is correct in that the Agreement stated that Jensen/Sinnett would have no further interest or involvement in the administration of the estate. But finding of fact 19 is not material to any issue on appeal.

FN8. In relation to this issue, Carnahan challenges finding of fact 9, which summarizes the terms of the Agreement, because it lacks the waiver/release clause. The finding accurately summarizes the Agreement and is supported by substantial evidence. It is not incorrect simply because it does not also refer to the release language. The complete Agreement, including

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the release language, is in the record and we consider it in its entirety.

FN9. Under TEDRA, parties interested in an estate may enter into an agreement that, once filed with the court having jurisdiction, is deemed approved by the court and "is equivalent to a final order binding on all persons interested in the estate or trust." RCW 11.96A.230(2).

***4** We agree with Jensen/Sinnett. They sued to enforce the Agreement—not to contest the will or be involved in the administration of the estate. Interpreting the release to bar an action to enforce the Agreement makes the Agreement a nullity. Such reasoning would permit either party to refuse to comply with their obligations and walk away with impunity. This cannot be what the parties contemplated under the release language. *Bakamus* is of no assistance to Carnahan. The release in that case plainly referred to the matter over which the plaintiff sought to sue. *Id*. at 251–52, 95 P.2d 767.

Concluding that Jensen/Sinnett's claims were not barred by the Agreement's release language, we turn to the substance of Carnahan's challenges to the trial court's conclusions that (1) Jensen/Sinnett were creditors of the estate and could therefore recover against the estate as creditors rather than beneficiaries and (2) Jensen/Sinnett's claims had a higher priority of payment over that of residual beneficiaries. These issues are related.

Carnahan argues that Jensen/Sinnett were not creditors. She contends that under the Final Will, she and Jensen were residuary beneficiaries and that under the Agreement, Sinnett agreed to the same status. She argues that the trial court's ruling allowed Jensen/Sinnett to "leapfrog" over certain specified beneficiaries who had not signed the TEDRA Agreement. Because the Agreement was not signed by those beneficiaries, she contends, they are not bound under RCW 11.96A.220, which requires "all parties" to sign an agreement. Finally, Carnahan argues that even if Jensen/Sinnett were correctly considered creditors, creditors must follow a specific procedure to have their claims considered, starting with filing a creditor's claim, which Jensen/Sinnett did not do.

Jensen/Sinnett argue that Carnahan's procedural assertions, if valid, would belong to third parties, not Carnahan. They respond to her argument that they could not be estate creditors because other beneficiaries did not sign the Agreement by pointing to unchallenged finding of fact 13, which states that all beneficiaries were served with a notice of the filing, a memorandum of the Agreement, and notice of hearing to approve the settlement, and none of the beneficiaries filed any objection. Therefore, the trial court's conclusion that the beneficiaries are barred by such notice is supported by substantial, unrebutted evidence. They argue that under the plain language of RCW 11.40.010, the process specified therein applies to creditors of the decedent, not creditors of the estate.

We hold that the trial court properly concluded that Jensen/Sinnett were creditors of the estate. They were creditors by virtue of the promissory note. Carnahan contends that Jensen/Sinnett had a beneficiary interest. She is incorrect. Although Jensen/Sinnett were beneficiaries under the will, under the Agreement they agreed to walk away from the will contest and the administration of the estate in exchange for a sum certain, half of which was owed under a promissory note secured by the house. In fact, Carnahan as PR could *not* abide by the will with respect to its bequests to Jensen/Sinnett because of this arrangement. The promissory note was subsequently issued by Jaback on behalf of the estate, and the amount due became a debt of the estate. The note stated plainly that it was "payable in full," not payable only to the extent that it was satisfied by the sale of the house. Therefore, the fact that the secured portion of the note was sold and distributed to Jensen/Sinnett did not discharge the note remainder. Furthermore, in November 2008, the trial court ordered that any unpaid portion of the promissory note was a debt of the es-

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tate, and this order was not appealed nor a motion for revision filed. FN10 This order became the law of the case, as the trial court ruled in unchallenged conclusion of law 7. As for Carnahan's argument that Jensen/Sinnett did not comply with the procedures under RCW 11.40.010, we agree with Jensen/Sinnett that the process specified therein applies to creditors of the decedent, not creditors of the estate. FN11

FN10. This ruling arose in connection with a petition by Jensen/Sinnett to remove Carnahan as PR.

FN11. The statute provides:

> A person having a claim against the *decedent* may not maintain an action on the claim unless a personal representative has been appointed and the claimant has presented the claim as set forth in this chapter. However, this chapter does not affect the notice under RCW 82.32.240 or the ability to maintain an action against a notice agent under chapter 11.42 RCW.

RCW 11.40.010 (emphasis added).

***5** Carnahan next argues that the court erred in concluding that she was personally liable. Her challenge to this conclusion is based on the release language in the Agreement, which stated that the parties agreed to release each other from claims arising from or relating to the administration of Howisey's estate. She argues that she could not be held personally liable under the Agreement.

Jensen/Sinnett respond that the unchallenged findings—verities on appeal—support the trial court's conclusion that Carnahan was personally liable as PR of the estate. They argue that because the estate owed money to them, they were permitted to bring an action against the PR, who was liable for losses caused by the breach of her responsibilities. They cite *In re Estate of Wilson,* 8 Wash.App. 519, 528, 507 P.2d 902 (1971) in support.

We agree with Jensen/Sinnett that the trial court did not err in concluding that Carnahan was personally liable. The trial court's conclusion was supported by the following findings of fact:

> 23. Ms. Carnahan paid attorneys' fees and distributed specific bequests without providing notice and before she had paid petitioner's note balance. She also preferred some legatees in favor of others paying 100% of the bequests due to Sita Gurung and Frework Alemayehu, while paying nothing to Marianne Hansen or the estate of G. Hansen. Although Ms. Hansen did not object to the TEDRA agreement, she did not waive her claims to the bequests due to her and her mother's estate.
>
> 24. Ms. Carnahan commingled estate assets with her own personal funds and used estate assets to pay personal expenses.
>
> 25. [Carnahan] has not provided an adequate accounting; even at trial, she admitted that she could not fully or clearly explain how she had managed the estate and did not even understand it herself.
>
> 26. Rather than retain a probate attorney to guide her through the probate process, Ms. Carnahan chose to consult no fewer than 5 attorneys through this process. She either failed to understand their advice or chose to disregard it. For example, she held up the sale of the Corliss residence by insisting that the promissory note would have to be compromised in order for the sale to go through even though Petitioners' attorney explained how the sale could go through and she had the services of a real estate attorney. She based some of her actions based [sic] on her misunderstanding of the law and her belief that she was capable of educating herself and did not need to seek the advice of an attorney. For example, she thought putting the estate funds into her own

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personal account and making withdrawals for both estate and personal purposes did not constitute improper "commingling." She thought that the bequest to G. Hansen lapsed because G. Hansen died even though Mr. Howisey preceded G. Hansen in death. She had the services available to her of highly competent counsel but chose not to avail herself of their guidance and counsel except when it suited her own purposes.

***6** 27. She caused financial harm to the estate by not wrapping up the estate in a timely and efficient manner.

28. Based on numerous contradictory representations in evidence admitted by the Court, such as whether the Estate had distributed specific bequests, whether the Estate had a Wells Fargo Account; and the value of the sale of the 1966 Thunderbird, the Court finds that Carol Carnahan has a poor memory, is confused about her own accountings and management of the estate, as well as the facts pertinent to this matter, and is not a reliable witness.

....

38. Ms. Carnahan did sell the Corliss property through a realtor for an amount less than which fully satisfied the Petitioner's lien but was fair market value. She did not immediately list it with a realtor but attempted to sell it on her own through word of mouth and flyers. She did not advertise it in the newspaper or internet sources. She did put in substantial time and effort in preparing the home for sale.

Out of these, Carnahan challenges only finding 23, and we find her challenge to be without merit. FN12 We also agree with Jensen/Sinnett that the release language does not preclude their action to obtain judgment on their promissory note or to hold Carnahan personally liable for that obligation. The Agreement states that Carnahan, Jensen, and Sinnett agreed to release each other from liability "[i]n exchange for the consideration set forth in this CR 2A Settlement...." The consideration for the release from liability is the full, agreed amount of $200,000. Because Jensen/Sinnett did not receive their consideration due under the Agreement, they are not precluded from proceeding against Carnahan.

FN12. Carnahan challenges finding of fact 23 because it "implies that Jensen–Sinnett's note balance was something other than the residuary 'beneficial share' that it was." She does not challenge the substance of the finding of fact, only what she contends is its implication. Carnahan does not dispute that (1) she paid attorney's fees and distributed certain bequests before paying the entire balance of Jensen/Sinnett's note, (2) paid 100 percent of the bequests to Sita Gurung and Frework Alemayehu while not paying the bequests to Hansen or her mother, (3) and Hansen did not waive her claims to the bequests to herself and her mother.

Moreover, Carnahan does not explain why the trial court erred in concluding that she was personally liable under RCW 11.76.160 and *Hesthagen v. Harby*, 78 Wash.2d 934, 94243, 481 P.2d 438 (1971). FN13 The PR has a statutory duty "to settle the estate, including the administration of any nonprobate assets within control of the personal representative under RCW 11.18.200, in his or her hands as rapidly and as quickly as possible, without sacrifice to the probate or nonprobate estate." RCW 11.48.010. Carnahan stood in the position of a fiduciary to those with a beneficial interest in the estate, including creditors. *See Matter of Estate of Larson*, 103 Wash.2d 517, 694 P.2d 1051 (1985). Under RCW 11.76.160, whenever a decree is made by a court for the payment of creditors, the PR is personally liable to each creditor unless the PR's inability to make the payment from the property of the Estate is not due to the fault of the PR. The trial court did not err in concluding that under the applicable law and its findings of fact, Carnahan was person-

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ally liable as PR.

FN13. The *Hesthagen* court stated:

> The administrator of a decedent's estate is an officer of the court and stands in a fiduciary relationship to those beneficially interested in the estate. In the performance of his fiduciary duties he is obligated to exercise the utmost good faith and to utilize the skill, judgment, and diligence which would be employed by the ordinarily cautious and prudent person in the management of his own trust affairs. For a breach of his responsibilities which causes loss to another, he stands liable.

78 Wn.2d at 942 (internal citations omitted). RCW 11.02.005 provides that the terms "personal representative" and "administrator" are interchangeable.

In sum, the trial court did not err in concluding that Jensen/Sinnett, through the Agreement and promissory note, were creditors of the estate who were entitled to be paid before specific beneficiaries. Unchallenged findings of fact support the amount of the judgment on the note and the Thunderbird. The trial court also did not err in concluding that Carnahan's actions as PR made her personally liable on the note. To the extent that there is any ambivalence in the Agreement or in how TEDRA applies to the parties' actions, TEDRA provides courts significant authority as follows:

***7** (1) It is the intent of the legislature that the courts shall have full and ample power and authority under this title to administer and settle:

(a) All matters concerning the estates and assets of incapacitated, missing, and deceased persons, including matters involving nonprobate assets and powers of attorney, in accordance with this title; and

(b) All trusts and trust matters.

(2) If this title should in any case or under any circumstance be inapplicable, insufficient, or doubtful with reference to the administration and settlement of the matters listed in subsection (1) of this section, the court nevertheless has full power and authority to proceed with such administration and settlement in any manner and way that to the court seems right and proper, all to the end that the matters be expeditiously administered and settled by the court.

RCW 11.96A.020.

Attorney's Fees Below

By its language, RCW 11.96A. 150 makes a trial court's award of costs and reasonable attorney's fees a matter of the court's discretion. *See* RCW 11.96A. 150(1). Here, the trial court awarded attorney's fees against the estate and Carnahan personally based on RCW 11.76.070,[FN14] the terms of the promissory note, and RCW 11.96A.150.[FN15] Carnahan challenges the award on the basis that it was contrary to the Agreement, which stated that the parties released and waived the right to recover attorney's fees and expenses from each other. Jensen/Sinnett respond that the trial court had discretion to award fees under RCW 11.96A.150(2), which provides that attorney's fees may be awarded to any party in " 'all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters.' " They also contend that RCW 4.84.330 provides for a mandatory award of attorney's fees and costs based on a claim for breach of contract if the contract provides that such award is mandatory.

FN14. RCW 11.76.070 provides:

> If, in any probate or guardianship proceeding, any personal representative shall fail or neglect to report to the court concerning his or her trust and any beneficiary or other interested party shall be reasonably required to employ legal counsel to institute legal proceedings to

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compel an accounting, or if an erroneous account or report shall be rendered by any personal representative and any beneficiary of said trust or other interested party shall be reasonably required to employ legal counsel to resist said account or report as rendered, and upon a hearing an accounting shall be ordered, or the account as rendered shall not be approved, and the said personal representative shall be charged with further liability, the court before which said proceeding is pending may, in its discretion, in addition to statutory costs, enter judgment for reasonable attorney's fees in favor of the person or persons instituting said proceedings and against said personal representative, and in the event that the surety or sureties upon the bond of said personal representative be made a party to said proceeding, then jointly against said surety and said personal representative, which judgment shall be enforced in the same manner and to the same extent as judgments in ordinary civil actions.

FN15. RCW 11.96A. 150(1) provides:

Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

The trial court concluded, "Fees are awarded under RCW 11.96A.150 because Ms. Carnahan's actions as Personal Representative of the Estate has led to the necessity of Petitioners' claims and the foregoing trial."

We affirm the award of attorney's fees. Although the Agreement states that no attorney's fees or expenses shall be awarded to or from each of the parties, the trial court properly concluded that such language did not apply where Jensen/Sinnett's action was taken to enforce the Agreement itself and where the promissory note explicitly provided, "If this note shall be placed in the hands of an attorney for collection, or if suit shall be brought to collect any of the principal or interest of this note, the undersigned promises to pay a reasonable attorney's fee." The "undersigned" was Jaback, as PR of the estate.

Attorney's Fees on Appeal

Jensen/Sinnett, citing RAP 18.1 and RCW 11.96A.150, request fees based on their right to fees before the trial court. RCW 11.96A.150 authorizes this court to award fees in our discretion. We award fees on appeal under that statute, subject to Jensen/Sinnett's compliance with RAP 18.1.

Affirmed.

WE CONCUR: ELLINGTON and BECKER, JJ.

Wash.App. Div. 1,2011.
In re Estate of Howisey
Not Reported in P.3d, 162 Wash.App. 1038, 2011 WL 2639324 (Wash.App. Div. 1)

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